was taken with his consent or permission. In his cross-examination he stuck to his story that the second defendant handed him the key of the car and helped to push the car in order to start it because its battery was weak.

I have given the whole of the evidence in this case very careful consideration. I am satisfied that the first defendant has told me the truth. He has given me a very clear account of what happened and he has given what I consider to be a very satisfactory explanation as to why he did not stop after the accident and why he did not make a report to the police until several days after the accident. It is common ground that for about a week prior to the accident he had been living on the hospitality of the second defendant. I accept his story that he occasionally drove the second defendant to his place of work in Petaling Jaya in return for the food, drink and cigarettes which he received from the second defendant. He received no salary from the second defendant because he was not an employee of the second defendant in the true sense of the word.

I do not accept the second defendant's story that he knew nothing about the first defendant making use of his car. I cannot believe that the first defendant took his car without his permission. I cannot rely very much on the evidence of Bilendran because I cannot accept his story that apart from hearing a noise he knew nothing about the accident. To my mind this witness was trying to conceal something.

In the result I have come to the conclusion that the first defendant drove the car at the request of the second defendant. I have also come to the conclusion that since he drove the car at the request of the second defendant to leave Letchumanan or Ratnam in Kuala Lumpur he was driving the car on the orders of the second defendant and not for a purpose of his own. In doing so he was acting as the servant or agent of the second defendant, so that the second defendant is vicariously liable for damages in consequence of his negligence. The question of quantum of damages has already been decided and I see no reason for disagreeing with it. Indeed both counsel have agreed to abide by the earlier decision as regards quantum.

There will be judgment for the first plaintiffs for $20,000 as general damages and $1,700 as special damages and for the second plaintiff for $5,000 as general damages and $685 as special damages. The amount of general damages in favour of the first two plaintiffs to be apportioned as under the order of the court against the first defendant dated 7th April, 1965 and the children's shares to be deposited with the Public Trustee in accordance with that order. Plaintiffs to have their costs of the trial of the only issue raised at the hearing of the action as between them and the second defendant.

Judgment for the plaintiffs.

Solicitors: *Kam Woon Wah & Co.; M. J. Mathew.*

LEE FOOK LUM v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Ong Hock Thye F.J. and Ismail Khan J.) August 18, 1965]

[K.L. — Federal Court Criminal Appeal No. 1 of 1965]

Internal Security Act, 1960, s. 57(1) & (3) — Possession of hand grenade — Defence that possession was solely for purpose of surrendering the article to authorities — When "lawful excuse".

The appellant was convicted of possession of a hand grenade without lawful authority and without lawful excuse. His defence was that he was in possession of the hand grenade only for the purpose of surrendering it to the authorities. This defence was rejected by the trial judge.

Held: the evidence in this case showed that the appellant's intention to surrender only came into existence after his landing in Malaya and at the time he met the three Malays to whom he surrendered and as he had not intended all along to surrender, no lawful excuse had been shown by the appellant for possession of the hand grenade. *Wong Pooh Yin* v. *Public Prosecutor* (1) distinguished.

Case referred to:—

(1) *Wong Pooh Yin* v. *Public Prosecutor* [1954] M.L.J. 189 P.C.

FEDERAL COURT.

T. G. Sim for the appellant.

Salleh bin Abbas (Deputy Public Prosecutor) for the respondent.

Thomson L.P. (delivering oral judgment): This appellant was convicted at Johore Bahru for an offence in contravention of section 57(1) of the Internal Security Act, 1960, and sentenced to death.

What was alleged against the appellant was that on 17th or 18th August, 1964, that is a year ago to-day, near Pontian, he carried a handgrenade without lawful authority and without lawful excuse.

Up to a point there was at the trial little controversy as to the facts. The appellant, who was a person domiciled here left this country and went to Indonesia where he had some sort of military training and he was then among the persons who took part in the first incursion at Pontian a year ago to-day. Shortly after landing he surrendered himself to some Malays whom he happened to meet and they took him to the police station. At some stage of these events he was in possession of at least one handgrenade. On his own admission he was in possession of it when he landed at Pontian but he said he threw it away after landing. On the prosecution evidence he was still in possession of it when he

surrendered himself to the three Malays and he handed it to one of them who took him to the police station.

The appellant has appealed against his conviction on two grounds.

One of these is that it was not sufficiently made out at the trial that he was in possession of the handgrenade and the second ground is that if he was in possession of it he had at the material time a lawful excuse.

The ground of appeal relating to possession is without substance. On any showing, on appellant's own evidence or on the prosecution evidence, he was in possession of the handgrenade at or about the time mentioned and at or about the place mentioned.

As regards lawful excuse the position is this.

The Act says:—

"57 (1) Any person who without lawful excuse, the onus of proving which shall be on such person, in any security area carries or has in his possession or under his control—

(a) any fire-arm without lawful authority therefor; or

(b) any ammunition or explosive without lawful authority therefor,

shall be guilty of an offence against this Part and shall be punished with death."

"Lawful excuse" is exegesised in sub-section (3) as follows:—

"A person shall be deemed to have lawful excuse for the purposes of this section only if he proves—

(a) that he acquired such fire-arm, ammunition or explosive in a lawful manner and for a lawful purpose; and

(b) that he has not at any time while carrying or having in his possession or under his control such fire-arm, ammunition or explosive, acted in a manner prejudicial to public security or the maintenance of public order."

It would be wrong for this court to restate in general terms of its own what is said in sub-section (1) and sub-section (3) of section 57. What we are concerned with here is the application of these sections where, in cases such as this, the defence is set up that the party in possession was in possession solely for the purpose of surrendering the tainted article to the authorities.

In the case of *Wong Pooh Yin* v. *Public Procutor*,[1] decided under the old Emergency Regulations, the Privy Council decided that such a state of affairs, if made out, brought an accused person within the protection of the words "lawful excuse". But of course whether or not it is made out must be a matter for decision by the trier of fact in each individual case and it is to be observed that in *Wong's* case the question had not been left at the trial to the triers of fact, who at that time were assessors, and it was on that ground that the appeal in *Wong's* case was successful.

In the present case the trier of fact, who was the trial judge, did apply his mind to the facts in this connection and what he found was that although at the time of his arrest the appellant had the intention to surrender that intention only came into existence at a point of time subsequent to his landing in this country. What the trial judge said was this:—

"As to the story of the accused about his being kidnapped or abducted — I think he is lying there. He must have known the purpose of the picnic and that he was to go to Indonesia."

Then having found that for the purpose of his case he went on:—

"I would say, too, that I accept his story that he met 3 Malays and he decided to surrender — "

Now these are findings of fact which this court must accept, and if they be accepted then it follows that immediately prior to that moment when he met the three Malays there was no question of any intention to surrender on his part and so there was no material whatsoever which would have afforded a foundation for accepting that he had made out what he was bound to make out if his defence was to succeed that he had acquired the handgrenade in a lawful manner and for a lawful purpose.

It is true that at the very end of his judgment the learned trial judge said:—

"In my opinion, by virtue of this sub-section, a person shall have lawful excuse only if he can prove that he acquired such explosive in a lawful manner and for a lawful purpose."

That, of course, is correct. Then he goes on:—

"For this reason I would now say the fact that the accused had intended all along to surrender with the handgrenade is no longer lawful excuse for the purpose of section 57(3)."

With great respect, in our view that statement goes too far. If there had been material on which to find that he had intended all along to surrender then of course that material would have had to be considered and if it had not been considered there would be a fatal fault in the proceedings. But such material as there was was considered and the judge's finding of fact was not that he had intended all along to surrender; his finding of fact was that the appellant's intention to surrender had only come into existence at the time he met the three Malays.

In the circumstances we have no option but to dismiss the appeal.

Appeal dismissed.

Solicitors: *Drew & Napier.*